Federal Court  Cour fédérale

Date: 20110211

Docket: T-1416-09

Citation: 2011 FC 162

Ottawa, Ontario, February 11, 2011

PRESENT: The Honourable Madam Justice Simpson

BETWEEN:

THE CORPORATION OF
THE CITY OF MISSISSAUGA

Applicant

and

MINISTER OF PUBLIC WORKS AND
GOVERNMENT SERVICES CANADA

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

INTRODUCTION

[1] This application deals with the question of whether the Minister of Public Works and Government Services Canada (the Minister) has the authority, pursuant to the *Payments in Lieu of Taxes* Act, RSC 1985, c M-13 (the Act), to make a payment in lieu of real property taxes (a PILT) to the City of Mississauga (Mississauga) in respect of real property taxes that were not paid to Mississauga by two former tenants of the Greater Toronto Airport Authority (GTAA).

[2] Since PILTs can only be made with respect to property defined as “federal property” under the Act, the answer to the above question depends on whether the property formerly occupied by the tenants of the GTAA is included in the Act’s definition of federal property.

[3] The GTAA is a private corporation. On December 2, 1996, it entered into a 60-year ground lease with the Federal Crown for Toronto’s Lester B. Pearson International Airport (Pearson Airport). The lease describes the GTAA as the “tenant” and the Crown as the “landlord”. Once the lease was signed, the GTAA itself occupied approximately 88% of the airport premises and sublet the balance to a variety of businesses including an airline known as Canada 3000 and a company called Transportation Hospitality Enterprises Inc. (THE). Together they will be described as the GTAA’s Tenants.

[4] The GTAA’s Tenants defaulted on their real property tax payments to Mississauga and it applied for PILTs. However, in a decision dated July 27, 2009, the Minister concluded that he did not have authority to make PILTs (the Decision). The Decision said:

> The authority of the Minister of Public Works and Government Services under the *Payments in Lieu of Taxes Act* to make payments in lieu of unpaid tenant taxes does not extend to properties in Ontario leased by the federal government to a designated airport authority, and subsequently sublet by the designated airport authority to a third party.

THE HISTORY OF THE ACT

[5] The rationale for the Act and its legislative history are among the topics discussed by the Supreme Court of Canada in *Montréal (City) v Montreal Port Authority*, 2010 SCC 14, [2010] 1 SCR 427. Therein, the Supreme Court observes that section 125 of the *Constitution Act, 1867* provides, in part, that property of the Canadian Government is immune from taxation by other levels of government, and that the authority to make PILTs was established to enable the Federal Government to compensate municipalities for the services they provide to Federal Government properties across Canada. The PILT scheme was introduced in the *Municipal Grants Regulations*, SOR/50-54, which were initially made under the *Appropriation Act, No 7, 1949*, SC 1949, c 42. Then, in 1951, the Federal Government passed the *Municipal Grants Act*, SC 1951, c 54. In that legislation, "federal property" was defined as real property owned by His Majesty in right of Canada but did not include real property leased to a tenant from whom, by reason of the tenant's interest that real property, a municipal taxing authority could collect real estate tax.

[6] The same language was found in the 1970 Revised Statutes of Canada's *Municipal Grants Act*. It was not a new act but rather a consolidation. It was repealed in 1992.

[7] Then, in the *Municipal Grants Act, 1980*, which came into force on July 17, 1980, the wording changed so that federal property did not include "except where otherwise prescribed, any real property leased to or occupied by a person or a body, whether incorporated or not, that is not a department."

[8] A revised version of the *Municipal Grants Act, 1980* appeared in RSC 1985, c M-13. It included an amended definition of federal property, which was split between the inclusions (now in subsection 2(1)) and the exclusions (now in subsection 2(3)). The language, which excluded premises leased to third parties, was amended slightly to read as follows: "For the purposes of the definition 'federal property' in subsection (1), federal property does not include, unless otherwise prescribed, any real property or immovable leased or occupied by a person or body, whether incorporated or not, that is not a department." This is the language currently found in paragraph 2(3)(h) of the Act and it means that, if the Crown leases to a third party, the Minister has no authority to make a payment in lieu of the tenant's taxes.

[9] In the early 1990s, the Federal Government decided to transfer the operation of several of Canada's airports from Transport Canada to private companies known as airport authorities. The transfers were to be accomplished by leasing the airports to the authorities. Pierre Elliot Trudeau International Airport and Mirabel Airport, in the province of Quebec, were the first to be leased. The lessor was Transport Canada and the lessee was the airport authority known as Aéroports de Montréal (ADM). ADM took control of the two airports on August 1, 1992.

[10] As noted above, the Act provided that real property leased by the Crown to third parties was not federal property. However, this rule was modified in the case of airport authorities. On August 27, 1992, the regulations under the Act were amended to add what now appears as paragraph 3(1)(m) of the *Payments in Lieu of Taxes Regulations*, SOR/81-29. This paragraph says that property which is owned by the Crown and leased to a designated airport authority is "federal

property" under the Act, but only if it is occupied by the airport authority. It also says that, if property is sublet by an airport authority, it is federal property only if the sub-tenant is the Crown.

[11] Eight years later, on May 31, 2000, *An Act to amend the Municipal Grants Act*, SC 2000, c 8 changed the name of the legislation to the *Payments in Lieu of Taxes Act* and added two sections. The first was section 2.1 (the Purpose Clause) and the second was section 3.1 which said that, if certain conditions were met (the Conditions), property leased to third parties would be deemed to be federal property so that a PILT could be made.

[12] For ease of reference, the relevant provisions of the current Act and the text of paragraph 3(1)(m) of the regulations are attached hereto as Schedule "A".

[13] On June 7, 2002, just after the amendments made in 2000 came into force, the Director of PILTs wrote to all the taxing authorities in Canada which played host to federal properties and provided them with an explanation for the introduction of section 3.1 (the Explanatory Letter). Under the heading "Third Party Tenants of the Crown", it noted that federal property that was leased to or occupied by a third party ceased to be eligible for a PILT and acknowledged that municipalities were having problems collecting arrears when third party tenants defaulted on their tax obligations because they could not sell Crown property to recover the arrears. The letter indicated that this problem had been addressed by the amendment to the Act, and stated the following under the heading "Third Party Tenants of the Crown":

> As you are aware, when federal property is leased to, or occupied by, a third party, that property is no longer eligible for a PILT payment, and the tenant or occupant is liable for payment of the property taxes as though they were the owner of the property. This gave rise to two circumstances that posed problems to you: situations of tax defaults

> were difficult for you to address; and, it was administratively inefficient, at best, to react to short-term tenancies. The improvements to the Act and Regulations address both circumstances.

[14] Further, the Explanatory letter said the following under the heading “Third Party Defaults”:

> In the circumstance where a tenant or occupant on Crown property defaults on their tax obligations to you, if you have made every reasonable effort to collect the tax debt and, in the opinion of our Minister, it is unlikely that the outstanding taxes are collectable, the Minister may make a payment in lieu of taxes on the area that was occupied by them.

[15] The Explanatory Letter also enclosed a clause by clause analysis of the amendments to the Act (the Analysis). It included the following statements about section 3.1:

> Purpose
>
> To expand the definition of “federal property” by providing authority for the Minister to exercise discretion to make payments on some tenant occupied property.
>
> Rationale
>
> In the private sector, it is always the owner’s obligation to ensure that property taxes are paid, regardless of any contractual agreements which may exist between owner and tenant. The government is of the opinion that it is not reasonable for municipal taxpayers to bear the burden of tax defaults by tenants of the Government of Canada.
>
> Comments
>
> This amendment addresses the municipal concerns that revenue is lost when tenants on federal property default on their tax obligations, or federal property is occupied by tenants for terms too short to allow taxing authorities to assess and tax the occupants.

[16] The Explanatory Letter and the Analysis for subsection 3.1 are attached hereto as Schedule B.

MISSISSAUGA'S REVENUES FROM PEARSON AIRPORT

[17] Mississauga's Memorandum of Fact and Law provides a useful discussion of this topic as it relates to payments made by the GTAA and its tenants. The relevant paragraphs are reproduced below:

> […]
>
> 3. Under the applicable legislation, the City has two distinct sources of revenue with respect to the Airport lands:
>
> (i) the portions of the Airport lands occupied directly by the GTAA are exempted from taxation under the Ontario Assessment Act on condition that the GTAA directly pays to the City certain payments in lieu of taxes calculated on the basis of a per passenger formula prescribed by regulation; and
> (ii) the portions of the Airport lands that are occupied by third party tenants (not the GTAA) are subject to taxation, and the third party tenants are liable to pay the applicable property taxes.
>
> […]
>
> 9. The [GTAA's] Tenants' premises were assessed in accordance with section 3 and 18 of the *Assessment Act* and the properties were levied taxes in accordance with the provisions of the former *Municipal Act* for the 2000, 2001 and 2002 taxation years.
>
> 10. The City forwarded tax bills to the [GTAA's] Tenants for the pertinent taxation years in accordance with the requirements of the *Municipal Act*. Canada 3000 Airlines Limited failed to pay real property taxes for the taxation years 2001 and 2002, with the result that as of the date of the PILT Application it had total tax arrears (inclusive of penalties and interest) of $139,798.58. Transportation Hospitality Enterprises Inc. failed to pay real property taxes for the taxation years 2000 and 2001, with the result that as of the date of the PILT Application it had total tax arrears (inclusive of penalties and interest) of $845,967.72. The total amount of real property tax arrears

> owed by the Tenants (inclusive of penalties and interest) was $985,766.30.
>
> 11. Canada 3000 Airlines Limited filed for bankruptcy on November 11, 2001; and Transportation Hospitality Enterprises Inc. ceased operations and was eventually dissolved on October 4, 2004. The City was unable to recover the outstanding taxes from the Tenants, which amounts it considers uncollectible.

[18] With regard to amounts paid to Mississauga with respect to all the tenants of the GTAA at Pearson Airport, the Crown's Memorandum of Fact and Law states the following:

> 16. The taxes levied by Mississauga against the tenants of the GTAA at Pearson for the taxation years 2000, 2001, and 2002 were: $15,810.375; $15,905,889; and, $13,401,093 respectively.

[19] The Crown's Memorandum also describes the PILTs paid by the GTAA. It says:

> 13. In addition to the taxes levied by Mississauga against tenants of the GTAA at Pearson such as Canada 3000 and THE, Mississauga also receives payments in lieu of taxes from the GTAA, in accordance with the Ontario Assessment Act Regulations. The payments in lieu of taxes vary from year to year based on the total number of enplaned and deplaned passengers (or passenger count) at Pearson.
>
> 15. The payments in lieu of taxes paid by the GTAA to Mississauga for the taxation years 2000, 2001 and 2002 (based on passenger count) were: $22,671,645; $23,897,405; and, $24,919,249 respectively.

THE STANDARD OF REVIEW

[20] In *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190 at paragraph 64, the Supreme Court of Canada said:

> The analysis must be contextual. As mentioned above, it is dependent on the application of a number of relevant factors,

> including: (1) the presence or absence of a privative clause; (2) the purpose of the tribunal as determined by interpretation of enabling legislation; (3) the nature of the question at issue, and; (4) the expertise of the tribunal. In many cases, it will not be necessary to consider all of the factors, as some of them may be determinative in the application of the reasonableness standard in a specific case.

[21] I will consider each factor in turn.

[22] The Act does not contain a privative clause, which suggests a reduced level of deference. The second factor suggests a similar conclusion. The decision under review did not involve the exercise of discretion on the part of the Minister. Rather, it dealt with whether the Act and its regulations grant the Minister the authority to make a PILT. I have also concluded that the nature of the question at issue suggests no deference. The question before the Court is one of statutory interpretation and is a pure question of law. Finally, the decision maker has no special expertise that would favour elevated deference.

[23] I am mindful that, when decisions are allocated to administrative decision makers with expertise, reasonableness may be the appropriate standard of review if a body is interpreting its own legislation. However, in this case, the Decision did not involve expertise in the calculation of PILTs and was not made by a body interpreting its own statute. The Decision was, in fact, a repetition of an opinion provided by the Department of Justice.

[24] In this regard, a letter from Public Works and Government Services Canada to Mississauga dated December 2, 2003 read in part:

> In consideration of the unique circumstances surrounding this particular case, PWGSC has requested an opinion from Justice Canada concerning the PILT eligibility of the property in question. Specifically we had asked Justice to provide an opinion whether section 3.1 allowed us to make a PILT payment related to tax default of sub-tenants of the GTAA; and how section 3(1)(m) of the PILT regulations affects this.
>
> Justice Canada has advised us that due to section 3(1)m of the PILT regulations, sub-tenants of the GTAA cannot be considered "federal property" as defined in the Act. Justice also advises that section 3.1 of the Act addresses real property leased from Her Majesty to a third party (GTAA), not real property which the GTAA subsequently sub-leases to another party. I therefore must advise you that payments related to tax defaults of tenants of the GTAA cannot be made under the provisions of the PILT Act and its regulations.

[25] For all these reasons, I have determined that correctness is the applicable standard of review.

THE PARTIES' POSITION

[26] The parties' submissions address the following topics:

(i) the interpretation of the Act and its regulations;

(ii) the Purpose clause;

(iii) the Explanatory Letter;

(iv) The Federal Court's decision in *Montréal (City) v Canada (Attorney General)*, 2007 FC 702, 335 FTR 10 (the Montreal Decision).

THE APPLICANT'S POSITION

(i) Statutory Interpretation

[27] Mississauga begins by referring to paragraph 3(1)(m) of the regulations under the Act (the Regulation). It reads as follows:

3. (1) The following classes of real property and immovables owned by Her Majesty in right of Canada and leased to or occupied by a person or a body, whether incorporated or not, that is not a department, are to be included in the definition "federal property" in subsection 2(1) of the Act, for the purposes of the Act:	**3.** (1) Tout immeuble ou bien réel qui appartient à Sa Majesté du chef du Canada et qui est pris à bail ou occupé par une personne ou par un organisme autre qu'un ministère, constitué en personne morale ou non, est à classer, pour l'application de la Loi, comme propriété fédérale au sens du paragraphe 2(1) de la Loi, s'il appartient à l'une des catégories suivantes :
[…]	[…]
(*m*) any real property or immovable owned by Her Majesty and leased to a designated airport authority within the meaning of the *Airport Transfer (Miscellaneous Matters) Act*,	*m*) tout immeuble ou bien réel appartenant à Sa Majesté et pris à bail par une administration aéroportuaire désignée, au sens de la *Loi relative aux cessions d'aéroports*, qui, selon le cas :
(i) which is not sublet to or occupied by any person other than the designated airport authority or a receiver-manager in possession of the assets of the designated airport authority, or	(i) n'est pas sous-loué à une personne autre que l'administration aéroportuaire désignée ou un séquestre-gérant en possession des éléments d'actif de l'administration aéroportuaire désignée ni occupé par une telle personne,
(ii) which is sublet to or occupied by Her Majesty.	(ii) est sous-loué par Sa Majesté du chef du Canada ou occupé par elle.

[28] Mississauga says, and the Respondent agrees, that the Regulation means that real property owned by the Crown and leased to the GTAA is federal property under the definition in subsection 2(1) of the Act if it is occupied by the GTAA or sublet by it to the Crown. The parties also agree

that the effect of the Regulation is that real property which is sublet by the GTAA to non-Crown third parties, such as the GTAA's Tenants in this case, is not federal property under subsection 2(1) of the Act. The parties further agree that the Regulation does not give the Minister authority to make a PILT in respect of the GTAA's Tenants' tax arrears.

[29] However, Mississauga says that the Regulation is not determinative of the issue of whether PILTs can be paid for the GTAA's tax arrears because regard must also be had for paragraph 2(3)(h) of the Act. It says:

(3) For the purposes of the definition "federal property" in subsection (1), federal property does not include	(3) Sont exclus de la définition de « propriété fédérale » au paragraphe (1) :
[…]	[…]
(*h*) unless otherwise prescribed, any real property or immovable leased to or occupied by a person or body, whether incorporated or not, that is not a department.	*h*) les immeubles et les biens réels pris à bail ou occupés par une personne ou par un organisme autre qu'un ministère, constitué ou non en personne morale, sauf exception prévue par règlement du gouverneur en conseil.

[30] According to Mississauga, this provision, like the Regulation, also means that property that is sublet to non-Crown third parties such as the GTAA's Tenants is not federal property. However, unlike the Regulation, paragraph 2(3)(h) of the Act provides for an exception when it says "unless otherwise prescribed".

[31] Mississauga then says that section 3.1 of the Act is the exception. According to Mississauga, because there is no dispute that the Conditions have been met in this case, the section deems the GTAA's Tenants to be occupants of federal property. The provision says:

3.1 Real property and immovables referred to in paragraph 2(3)(h) are deemed to be federal	3.1 Les immeubles et biens réels visés à l'alinéa 2(3)h) sont réputés être des propriétés fédérales

property for a taxation year if

(a) as of the day following the last day of the taxation year, all or part of the real property tax or the frontage or area tax on the property for that taxation year remains unpaid; and

(b) the Minister is of the opinion that the taxing authority has made all reasonable efforts to collect the tax and there is no likelihood that the authority will ever be able to collect it.

pour une année d'imposition donnée si les conditions suivantes sont remplies :

a) tout ou partie de l'impôt foncier ou de l'impôt sur la façade ou sur la superficie est en souffrance le jour suivant la fin de l'année d'imposition;

b) le ministre est d'avis que l'autorité taxatrice a pris les mesures raisonnables pour percevoir l'impôt et qu'il est impossible qu'elle puisse le faire.

(ii) The Purpose Clause

[32] Mississauga also relies on the Purpose Clause in support of its position that PILTs may be paid in respect of the GTAA's Tenants' unpaid real property taxes. It reads:

2.1 The purpose of this Act is to provide for the fair and equitable administration of payments in lieu of taxes.

2.1 La présente loi a pour objet l'administration juste et équitable des paiements versés en remplacement d'impôts.

[33] Mississauga says that it is prejudiced in its efforts to collect real estate tax arrears from the GTAA's Tenants because they occupy land owned by the Crown. Accordingly, it cannot sell the property to discharge the tax debt. This situation, it says, is unfair and the Purpose Clause entitles it to a statutory interpretation that produces a fair result.

(iii) The Explanatory Letter

[34] With regard to the Explanatory Letter, Mississauga says that reference in the heading to "Third Party Tenants of the Crown" is not conclusive because the Explanatory Letter also uses the language of paragraph 2(3)(h) of the Act (i.e., "leased to or occupied by") and speaks broadly of the

difficulties caused when federal property is leased to or occupied by a third party. As well, Mississauga notes there is a shorter heading which simply reads “Third Party Defaults” and does not indicate that the third party must be a tenant of the Crown. Further, the narrative which follows the heading again speaks broadly of tenants or occupants on Crown property and Mississauga says that that language clearly encompasses the GTAA’s Tenants. Mississauga therefore submits that the Explanatory Letter supports its interpretation of the Act.

(iv) The Montreal Decision

[35] Lastly, Mississauga relies on the conclusions reached by Mr. Justice Luc Martineau in the Montreal Decision. In that case, he considered whether the Minister had authority to make PILTs in connection with property tax arrears owed by defaulting non-Crown tenants of the ADM in Quebec. He concluded that paragraph 2(3)(h) of the Act included sublet property and that section 3.1 of the Act therefore applied to deem the property of defaulting tenants of the ADM to be federal property. This meant that PILTs could be made.

[36] At paragraph 46 of his decision, Mr. Justice Martineau said:

> There is no doubt that the immovables and real property leased to ADM are generally excluded from the definition of “federal property” by paragraph 2(3)(h) of the PLTA, which covers “unless otherwise prescribed, any real property or immovable leased to or occupied by a person or body, whether incorporated or not, that is not a department” [emphasis added]. However, the expression “leased to or occupied” [emphasis added] must be given an interpretation that is consistent with the plain meaning of the words chosen by Parliament and with the general purpose of the PLTA. In this case, both lessees and sub-lessees are included in the scope of paragraph 2(3)(h) of the PLTA, which is consistent with the terms “leased” and “occupied.” However, section 3.1 of the PLTA provides

> that real property and immovables referred to in paragraph 2(3)(h) are deemed to be federal property for a taxation year if certain conditions are met, as is the case here.
>
> [my emphasis]

[37] At paragraph 48, he also said:

> …However, one must not lose sight of the purpose of the PLTA, which is to "provide for the fair and equitable administration of payments in lieu of taxes" (section 2.1 of the PLTA). Needless to say, the applicant cannot obtain the judicial sale of an immovable or real property belonging to Her Majesty which is leased to or occupied by a third party which has defaulted on the payment of its real property tax bill. In such a situation, it is unfair that the taxing authority cannot receive a PILT. The fact that the Minister has signed a lease with the designated airport administration rather than with the defaulting sub-lessee or occupant seems to me to be an irrelevant external factor for the purposes of applying sections 3 and 3.1 of the PLTA…

[38] Mississauga submits that, because the Crown initially appealed the *Montreal Decision* and then discontinued the appeal, the decision is good law and should be applied in this case.

THE RESPONDENT'S POSITION

(i) Statutory Interpretation

[39] The Crown also opens its submissions with the Regulation. However, unlike Mississauga, the Respondent says that the Regulation is dispositive. It says that, properly read, it means that airport property which is sublet by persons other than the Crown can never be federal property under the Act.

[40] The Respondent also says that paragraph 2(3)(h) and section 3.1 of the Act do not come into play because property included under the former is only brought into the latter if it has not been

"otherwise prescribed". In this case, because property sublet by airport authorities to non-Crown tenants has been otherwise prescribed in the Regulation, it does not fall under paragraph 2(3)(h) and cannot therefore be included under section 3.1.

[41] The Respondent also notes that section 3.1 does not mention sub-tenants or sub-lessees and should not be construed to include them because the Act makes it clear that PILTs are only authorized for property which the Crown controls.

(ii) The Purpose Clause

[42] The Respondent did not make submissions about this provision of the Act.

(iii) The Explanatory Letter

[43] The Respondent submits that the Explanatory Letter makes it clear that section 3.1 was intended to apply only to tenants who leased directly from the Crown and to parties who occupied Crown property under license. It says that the heading "Third Party Tenants of the Crown" and the text of the clause by clause analysis which speaks of "tenants of the Government of Canada" make it clear that PILTs are not authorized for parties who do not lease directly from the Crown.

(iv) The Montreal Decision

[44] The Crown says that it withdrew its appeal from the Montreal Decision because, although it did not agree with the reasons, it agreed with the result to the effect that PILTs were authorized for tenants of the ADM. Counsel says the Crown agreed with this result because Quebec legislation provides that the ADM is not a tenant of the Crown. This means that leases between the ADM and its tenants are treated as leases made directly with the Crown and that section 3.1 of the Act therefore applies so that PILTs can be made when the Conditions are met.

[45] The relevant Quebec legislation is entitled the *Act respecting aéroports de Montréal*, SQ 1991, c 106. It provides in section 2 that, for municipal taxation purposes, the ADM cannot be a lessee, an occupant or the owner of an immovable. As well, pursuant to section 204.1.1 of the *Act respecting municipal taxation*, RSQ, c F-2.1, the ADM is exempt from paying municipal taxes if PILTs are paid by the Crown.

[46] However, the Respondent says that the situation is different in Ontario because the GTAA is a lessee of the Crown and its tenants are not tenants of the Crown. Further, the GTAA is a taxable entity and is only given an exemption from municipal taxes provided it makes payments in lieu thereof based on passenger counts pursuant to the regulations to the *Assessment Act*, O Reg 282/98.

[47] The Respondent's position is that section 3.1 of the Act only applies to land leased by or occupied under licence from the federal government and that to interpret it to include non-Crown

sub-lessees of the GTAA would impose unforeseen and unmanageable potential liability for PILTs on the federal government with regard to parties with whom the Crown has no relationship.

CONCLUSIONS

(i) Statutory Interpretation

[48] I was not persuaded by either party's approach to this issue. In my view, the analysis should start with the Act rather than with the Regulation.

[49] The phrase "unless otherwise prescribed" in paragraph 2(3)(h) of the Act directs the reader to look elsewhere for a provision which says that property leased to non-Crown third parties is included in the definition of "federal property".

[50] When this exercise is undertaken, one such inclusion is found. The Regulation includes property leased by designated airport authorities such as the GTAA in the definition of "federal property". However, by reason of subparagraph 3(1)(m)(i) of the Regulation, this inclusion does not cover non-Crown tenants of airport authorities so they are not within the meaning of "otherwise prescribed" in paragraph 2(3)(h). This means their property is not federal property and they remain excluded within the meaning of 2(3)(h) because, in my view, the language "leased to or occupied by a person or body" is not limited to licensed occupants and is broad enough to include sub-lessees.

[51] Because the GTAA's Tenants are not "otherwise prescribed", section 3.1 of the Act applies and, because the Conditions have been met in this case, it deems the GTAA's Tenants' property to be federal property. This means that PILTs are authorized for the GTAA's Tenants.

[52] In reaching this conclusion, I have rejected the interpretation of "unless otherwise prescribed" advanced by the Crown. It appears to interpret the phrase to mean "unless referred to elsewhere". While it is true that the Regulation refers to third party tenants of an airport authority, it does not include them in the definition of federal property. Instead, it excludes them.

(ii) The Purpose Clause

[53] The Supreme Court of Canada commented on this clause in *Montréal (City) v. Montreal Port Authority*, *supra* at paragraph 43. There it said:

> Although the Act confirms both the principle that federal property is immune from taxation and the voluntary nature of payments in lieu, the intention of that the calculation of such payments would be consistent with the objective of equity and fairness in dealing with Canadian municipalities.

[54] Mississauga asks me to interpret it more broadly to justify extending the reach of the legislation to solve its collections problem by including non-Crown tenants of airport authorities in the definition of federal property. However, in my view, the Purpose Clause deals with calculations and not collections. Therefore, in this case, it does not assist in the interpretation of the Act.

(iii) The Explanatory Letter

[55] Before section 3.1 was added to the Act, the situation regarding PILTs for tenants on Crown land was as follows:

- If the Crown land was an airport operated by Transport Canada, PILTs were not payable on premises leased to non-Crown third parties (see 2(3)(h) of the Act);
- If the Crown land was an airport operated by a designated airport authority, PILTs were not payable on premises sublet by the authority to non-Crown third parties (see the Regulation).
- If the Crown land was not an airport, PILTs were not payable on premises leased to non-Crown third parties (see 2(3)(h) of the Act).

[56] Against this background, it is important to note that the Explanatory Letter which describes the rationale for section 3.1 of the Act, was written to all taxing authorities which hosted federal properties including airports. This suggests that section 3.1 applies to third party tenants of airport authorities.

[57] Indeed, the Explanatory Letter shows at page 2 that it deals with both third party tenants of the Crown and third party tenants <u>on</u> Crown property. The latter would include the GTAA's Tenants and this makes sense as the rationale for making PILTs under section 3.1 is the same for the tenants of the Crown and subtenants of airport authorities.

[58] The Analysis also deals with both tenants <u>of</u> the Crown and tenants <u>on</u> Crown property. The former are mentioned under the heading Rationale and the latter are discussed in the Comment. The use of the word "some" in the passage entitled "Purpose" is, in my view, reference to the fact that

only property which meets the Conditions in section 3.1 will be eligible for PILTs. It does not mean, as the Crown suggests, that third party tenants of airport authorities are excluded from the ambit of section 3.1.

(iv) The Montreal Decision

[59] I accept the Crown's explanation for its withdrawal of its appeal of the Montreal Decision and have therefore considered its submission that, although the decision was correct, the reasoning should not be followed.

[60] As my conclusions show, I agreed with Mr. Justice Martineau when he said that the language of paragraph 2(3)(h) of the Act was broad enough to include both lessees and sub-lessees. However the balance of my decision is based on my own conclusions.

[61] For all these reasons, this application will be allowed with costs to Mississauga.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that the application is hereby allowed with costs to the Applicant.

"Sandra J. Simpson"
Judge

SCHEDULE "A"

THE ACT

2.1 The purpose of this Act is to provide for the fair and equitable administration of payments in lieu of taxes.

2.1 The purpose of this Act is to provide for the fair and equitable administration of payments in lieu of taxes.

2. (3) For the purposes of the definition "federal property" in subsection (1), federal property does not include

[…]

(*h*) unless otherwise prescribed, any real property or immovable leased to or occupied by a person or body, whether incorporated or not, that is not a department.

2. (3) Sont exclus de la définition de « propriété fédérale » au paragraphe (1) :

[…]

h) les immeubles et les biens réels pris à bail ou occupés par une personne ou par un organisme autre qu'un ministère, constitué ou non en personne morale, sauf exception prévue par règlement du gouverneur en conseil.

3.1 Real property and immovables referred to in paragraph 2(3)(*h*) are deemed to be federal property for a taxation year if

(*a*) as of the day following the last day of the taxation year, all or part of the real property tax or the frontage or area tax on the property for that taxation year remains unpaid; and
(*b*) the Minister is of the opinion that the taxing authority has made all reasonable efforts to collect the tax and there is no likelihood that the authority will ever be able to collect it

3.1 Les immeubles et biens réels visés à l'alinéa 2(3)*h*) sont réputés être des propriétés fédérales pour une année d'imposition donnée si les conditions suivantes sont remplies :

a) tout ou partie de l'impôt foncier ou de l'impôt sur la façade ou sur la superficie est en souffrance le jour suivant la fin de l'année d'imposition;
b) le ministre est d'avis que l'autorité taxatrice a pris les mesures raisonnables pour percevoir l'impôt et qu'il est impossible qu'elle puisse le faire.

THE REGULATION

3. (1) The following classes of real property and immovables owned by Her Majesty in right of Canada and leased to or occupied by a person or a body, whether incorporated or not, that is not a department, are to be included in the definition "federal property" in subsection 2(1) of the Act, for the purposes of the Act:

3. (1) Tout immeuble ou bien réel qui appartient à Sa Majesté du chef du Canada et qui est pris à bail ou occupé par une personne ou par un organisme autre qu'un ministère, constitué en personne morale ou non, est à classer, pour l'application de la Loi, comme propriété fédérale au sens du paragraphe 2(1) de la Loi, s'il appartient à

[…]

(*m*) any real property or immovable owned by Her Majesty and leased to a designated airport authority within the meaning of the *Airport Transfer (Miscellaneous Matters) Act*,
(i) which is not sublet to or occupied by any person other than the designated airport authority or a receiver-manager in possession of the assets of the designated airport authority, or
(ii) which is sublet to or occupied by Her Majesty.

l'une des catégories suivantes :

[…]

m) tout immeuble ou bien réel appartenant à Sa Majesté et pris à bail par une administration aéroportuaire désignée, au sens de la *Loi relative aux cessions d'aéroports*, qui, selon le cas :
(i) n'est pas sous-loué à une personne autre que l'administration aéroportuaire désignée ou un séquestre-gérant en possession des éléments d'actif de l'administration aéroportuaire désignée ni occupé par une telle personne,
(ii) est sous-loué par Sa Majesté du chef du Canada ou occupé par elle.

SCHEDULE B

Public Works and Government Services Canada
Ontario Region
4900 Yonge St.
North York, Ontario
M2N 6A6

Travaux publics et Services gouvernementaux Canada
Région de l'Ontario
4900, rue Yonge
North York (Ontario)
M2N 6A6

Your File
Votre réf.

In reply quote:
Réf. à rappeler :

For further information please contact:
Pour de plus amples informations, prière de communiquer avec :

June 7, 2002

To All Taxing Authorities in Canada
Hosting Federal Property

Dear Sir/Madam:

Re: Payments in Lieu of Taxes - Modernization of the Municipal Grants Program

As Director of Payments in Lieu of Taxes (PILT), Management and Consulting, Public Works and Government Services Canada, I am responsible for the delivery of the federal Payments in Lieu of Taxes Program to Canadian taxing authorities that host federal departmental property. It is my pleasure to announce that the *Payments in Lieu of Taxes Act, 2000* and its Regulations, which represent the culmination of significant consultations with municipal levels of government and the Federation of Canadian Municipalities (FCM), has been brought into force by the Government of Canada.

You will find attached an information package containing a complimentary copy of the consolidated version of the *Payments in Lieu of Taxes Act* and associated Regulations, a Clause by Clause Analysis of the changes contained in the new Act, as well as new application forms for your annual request for a payment in lieu of taxes. I would like to take this opportunity to touch on some of the more important changes to the *PILT Act* and explain the impact of these changes to you, and the process and results of applying for a payment in lieu of taxes under the provisions of the new Act. For further details on these changes, please refer to the attachments.

Late Payment Supplement (Payment in Lieu of Interest)

One of your concerns related to the timing of our payments, and our inability to pay interest where payments were unreasonably delayed. The new *PILT Act* now allows us to make a supplementary payment (in lieu of interest) in situations where a PILT payment to a municipality has been delayed.

If you are of the opinion that your 2000, 2001 or 2002 PILT payment was unreasonably delayed and you wish to be considered for a Late Payment Supplement for these years, you are required to complete a new application for each of these years complete with your interest bylaws and a description of your practice of charging interest on tax payments made after the due date and submit this application for consideration to PWGSC. If you choose not to submit a new application you will not be considered for a Late Payment Supplement for these years. Our normal practice respecting retroactive applications, limiting retroactive applications to current year minus 4 years, or that period of retroactivity practiced by the taxing authority, will apply.

Beginning for the 2003 tax year in order for you to be considered for a late payment supplement, you would have to:

1. submit a complete PILT application, and allow us the same advance notice, time frame and due dates that you provide when you request a tax payment from a taxable owner;

2. indicate, in Part 6 of the new PILT application form, that you wish to be considered for a late payment supplement. If this part of the application is left blank, the late payment supplement will not be included as part of the payment sent to you; and,

3. include with your application, copies of the bylaw pertaining to interest charged (rate, beginning date, etc.) on overdue tax accounts, and proof of the actual application of the policy.

Third Party Tenants of the Crown

As you are aware, when federal property is leased to, or occupied by, a third party, that property is no longer eligible for a PILT payment, and the tenant or occupant is liable for payment of the property taxes as though they were the owner of the property. This gave rise to two circumstances that posed problems to you: situations of tax defaults were difficult for you to address; and, it was administratively inefficient, at best, to react to short-term tenancies. The improvements to the Act and Regulations address both circumstances.

Third Party Defaults

In the circumstance where a tenant or occupant on Crown property defaults on their tax obligations to you, if you have made every reasonable effort to collect the tax debt and, in the opinion of our Minister, it is unlikely that the outstanding taxes are collectable, the Minister may make a payment in lieu of taxes on the area that was occupied by them. It is important to emphasize that this payment will be in the form of a payment in lieu of tax.

It will also be subject to a late payment supplement, as defined in the provisions of the Act.

Once again, there are certain prerequisites consistent with the new Act. In order for you to be eligible for a payment in these third party default situations, you must:

1. demonstrate that you have applied all recourse mechanisms available to you to collect the outstanding tax debt directly from the tenant;

2. provide us with early notification that a tenant or occupant is in arrears on their previous year's property tax payment. To facilitate this process, we have included a new Part 7 of the revised PILT application so you may list any such situations to permit us the opportunity to take corrective action, under the terms and conditions of the lease or agreement between the tenant or occupant and the federal department owning the property. Please recognize that it is unlikely that PWGSC will consider making a payment for long periods of time that have elapsed since a tenant or occupant has fallen into arrears, if we are not notified of this situation in a timely manner.

Third Party Leases Whose Term is Less Than One Year

To assist you to maintain predictable revenue, the federal government will be exploring opportunities with the various provincial governments with respect to short term tenants and occupants of federal property. The property subject to a short-term lease or occupation of one year or less may now be considered to remain as "federal property" for the purposes of making a payment under the provisions of the PILT Act. This is designed to guard against financial loss to you in situations where tenants vacate Crown properties before the assessment authorities and you have an opportunity to assess and tax the occupant for real property tax.

Property Improvements No Longer Excluded From The Calculation of PILT

In order for improvements to land to be eligible for a payment in lieu of tax, the Act requires that they be "designed primarily for the shelter of people, living things, fixtures, personal property or movable property". To provide more consistency between improvements eligible for a payment, and those that are eligible for property tax, certain improvements, that were previously excluded from the calculation of the PILT payment, are now considered eligible under the new Act. These include: golf course improvements, outdoor swimming pools, driveways for single family dwellings, paving or other improvements associated with employee parking and outdoor theaters. Property values submitted on the PILT applications should include values for these improvements, when they are present.

Revised Application Form

We have revised the application form in order to reflect the changes to the Act and Regulations. The major changes to the form have been highlighted in the previous paragraphs. A copy of the revised form is included in this package.

It is important to stress that, in order to avoid delays in receiving PILT payments, you must make every effort to complete the new application form in its entirety, and provide all relevant information indicated in all parts of the application. If you do not complete all sections of the application and include the requested information and supporting documents, the application will be returned to you for completion and resubmission.

Payments In Lieu of Taxes Dispute Advisory Panel

I am also pleased to announce that the Payments in Lieu of Taxes Dispute Advisory Panel (PILT-DAP) has been enshrined in the new *PILT Act*. The PILT-DAP will replace the function of the Municipal Grants Review Committee. The mandate of the PILT-DAP will be to provide advice to the Minister of PWGSC, in order for the Minister to resolve disagreements between you and PILT officials, related to property value, property dimension or effective rate applicable to any federal property, or to claims that a late payment supplement should apply. We are working closely with representatives of the Federation of Canadian Municipalities to establish this new Panel. I expect that the Panel will be in a position to begin hearings late this calendar year. I will be issuing a follow-up communiqué to you once the PILT Dispute Advisory panel has been established by Governor-in-Council appointment.

Payments Made By Federal Crown Corporations

It is important to note that these same provisions outlined above now also apply to the federal Crown corporations and agencies listed in Schedules III and IV to the *PILT Act*. In particular, the mandate of the PILT-Dispute Advisory Panel has been expanded to include disputes between taxing authorities and Crown corporations and agencies that are listed in these schedules. You will now be able to request a hearing before the PILT-DAP where you are dissatisfied with the amount of payment that you have received from these federal corporations and agencies. The PILT-DAP will hear the opinions of both parties and provide advice to the head of the Crown corporation or agency with respect to the fair and equitable resolution of the disagreement.

The foregoing improvements relate to legislative and regulatory changes aimed at modernizing the Payments in Lieu of Taxes Act and associated Regulations. We have also already initiated the following policy changes pertaining to our administration of the PILT program on federal departmental properties, as part of the overall initiative to modernize the PILT program delivery, and to reflect the recommendations of the Joint Technical Committee on Payments in Lieu of Taxes:

1. We agree to respect the normal taxing authority due dates for making PILT payments where a completed application is received in a timely manner.

2. We have implemented procedures to assure the timely notification to you, advising which federal property assessments will be challenged by PWGSC.

3. We will clearly indicate the rationale for any adjustment to the amount of PILT payment applied for, when final payment is made.

4. We will make every reasonable effort to consult with the assessment authority at the early stages of establishing the annual assessment roll to maximize predictability for the taxing authority.

The above improvements to the PILT program are aimed at bringing the federal payments in lieu of taxes program to a position that is closer to that experienced by other taxable property owners. Fairness to all stakeholders, equity with respect to the treatment of other property owners, and predictability are the principles that guide the delivery of the PILT Program. PWGSC will continue to make payments in accordance with these principles, and actively work with both your representatives and those of the assessment authorities towards the timely resolution of differences of opinion wherever possible.

I have also enclosed in this package, an information sheet entitled "Recognizing the Contributions of Municipal Governments". This paper emphasizes our commitment to these principles. If you would like further information, or would like to discuss the above, I invite you to contact the Regional Manager, Payments in Lieu of Taxes, Management and Consulting in our Regional office which receives and processes your applications. These managers are listed on the reverse of the information sheet.

Yours sincerely,

Gary Abson
Director
Payments in Lieu of Taxes
Management and Consulting
Public Works and Government Services Canada

Enclosures

CLAUSE BY CLAUSE ANALYSIS OF AMENDMENTS
MODERNIZATION OF THE MUNICIPAL GRANTS ACT

BILL C-10	EXPLANATORY NOTES

2nd Session, 36th Parliament,
48 Elizabeth II, 1999

THE HOUSE OF COMMONS OF CANADA

BILL C-10

An Act to amend the Municipal Grants Act

Her Majesty, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows:

MUNICIPAL GRANTS ACT

R.S., c. M-13

1. The long title of the *Municipal Grants* Act is replaced by the following:

An Act respecting payments in lieu of taxes to municipalities, provinces and other bodies exercising functions of local government that levy real property taxes

2. Section 1 of the Act is replaced by the following:

Short title

1. This Act may be cited as the *Payments in Lieu of Taxes* Act.

1991, c. 50, s. 32 1

3. (1) The definitions "immeuble fédéral" and "immeuble imposable" in subsection 2(1) of the French version of the Act are repealed.

(2) The definitions "assessed dimension", "assessed value", "assessment authority", "business occupancy tax", "frontage or area tax", "other attribute" and "real property tax" in subsection 2(1) of the Act are replaced by the following:

SUMMARY

This enactment amends the *Municipal Grants* Act to improve the fairness, equity and predictability of payments made under the Act. A statement of purpose is included. The enactment establishes an Advisory Panel to advise the Minister on disputes concerning payment amounts. It addresses the issues of compensation for untimely payments, defaults on tax obligations by certain tenants of the Crown and the bijural nature of the Canadian legal system. The enactment also makes other amendments of an administrative nature.

EXPLANATORY NOTES

Municipal Grants Act

Clause 1: The long title reads as follows:

An Act respecting grants to municipalities, provinces and other bodies exercising functions of local government that levy real property taxes

Clause 2: Section 1 reads as follows:

1. This Act may be cited as the *Municipal Grants* Act.

Clause 3: (1) to (4) The definitions "assessed dimension", "assessed value", assessment authority", "business occupancy tax", "effective rate", "federal property", "frontage or area tax", "other attribute", "property dimension", "property value", "real property tax" and "taxable property" in subsection 2(1) read as follows:

CLAUSE BY CLAUSE ANALYSIS OF AMENDMENTS
MODERNIZATION OF THE MUNICIPAL GRANTS ACT

PURPOSE	COMMENTS
To improve the equity of the Payments in lieu of taxes program. Rationale By giving authority to the Minister to exercise his discretion respecting compensation for municipalities when payments in lieu of taxes are unreasonably delayed, the government will achieve improved equity among municipalities, with respect to payments in lieu of taxes, by placing all municipalities on the same financial footing.	If for some reason, such as, a dispute concerning valuation that has been referred to the Advisory Panel, there is a delay in making a final payment to a municipality, a supplemental payment to compensate the municipality for the loss of the use of that portion of the payment delayed would put it on the same financial footing as other municipalities that did not experience such a delay in payment. Municipalities will be required to show that the payment has been delayed through no fault of their own.
Clause 5: subsection 3(4) *Purpose* To identify which Indian band councils may be considered "taxing authorities" for the purposes of payments in lieu of taxes under the provisions of this Act. Rationale Only First Nations governments identified in section 2(1) paragraph (b) are eligible to become taxing authorities recognized by the Municipal Grants Act for payments in lieu of taxes.	
Clause 5: subsection 3.1 *Purpose* To expand the definition of "federal property" by providing authority for the Minister to exercise discretion to make payments on some tenant occupied property. Rationale In the private sector, it is always the owner's obligation to ensure that property taxes are paid, regardless of any contractual agreements which may exist between owner and tenant. The government is of the opinion that it is not reasonable for municipal taxpayers to bear the burden of tax defaults by tenants of the Government of Canada.	This amendment addresses the municipal concerns that revenue is lost when tenants on federal property default on their tax obligations, or federal property is occupied by tenants for terms too short to allow taxing authorities to assess and tax the occupants.

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1416-09
STYLE OF CAUSE:	The Corporation of the City of Mississauga v Minister of Public Works and Government Services Canada
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	28-SEP-2010
REASONS FOR :	SIMPSON J.
DATED:	February 11, 2011

APPEARANCES:

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MR. PETER SOUTHEY	FOR THE RESPONDENT

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